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No. 83-562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN DEAN,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

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TRANS WORLD AIRLINES, INC., and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Dean, a pilot employed by Trans World Airlines, Inc. ("TWA"), was required by virtue of the applicable collective bargaining agreement to join the union representing TWA's pilots and pay its customary dues or, in the alternative, to remain a nonmember and pay a service charge to the union in an amount equal to such dues. A.6; 20, ¶ 5; 41.[1]

[1] "A." references are to the decisions of the district court and the court of appeals, and to related materials, reprinted in an Appendix to the Petition.

Dean wrote numerous letters to the union—the Respondent Air Lines Pilots Association, International ("ALPA")—protesting the service charge obligation, characterizing it as an "unconstitutional tax," and disputing ALPA's authority to impose it. A. 2-3, 20-21. Among other things, Dean asserted in a March 15, 1976, letter that the law prevented ALPA from spending money for "bribes, political contributions, mafia payoffs, etc."; in this letter, Dean also cited the Supreme Court's decisions in *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961) and *Brotherhood of Railway and Steamship Clerks* v. *Allen*, 373 U.S. 113 (1963). A. 2-3.[2] ALPA's Treasurer responded in writing to all of Dean's protests, but declined to make any adjustment in Dean's service charge (A. 6; 20-21), explaining that ALPA did not spend any union funds for "political campaign contributions, or for any unlawful purposes." A. 38.

Thereafter, Dean refused to pay the union's monthly service charge billings in full. In January 1977, although his monthly obligation was calculated by ALPA to be $40.00, Dean paid only $10.00. For each of the next five months, Dean continued to pay only $10.00 per month, an amount selected unilaterally by him. A. 3; 7. When Dean failed to take any steps to cure his growing delinquency, despite repeated written notices and warnings from ALPA (A. 3; 38-39), his discharge was requested in July 1977 by ALPA and implemented by TWA the following month. A. 3.

Before the district court, Dean argued, among other things, that his discharge was unlawful by virtue of the

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[2] At A. 37, Petitioner has printed only a portion of Dean's 1976 letter; the text of the entire letter appears, *infra*, as an Appendix to this Brief.

decision in *Street, supra.* Having made a proper *Street* objection in 1976, he contended, and receiving no reduction in his service charge, he was entitled to reduce his payments unilaterally without becoming subject to discharge under the agency shop provisions of the TWA-ALPA agreement. ALPA contended that Dean's correspondence, properly interpreted, did not appear to raise a genuine *Street* objection; moreover, ALPA asserted, the *Street* case and its progeny gave employees no right to make unilateral reductions in their monetary obligations and no protection against enforcement of the bargaining agreement if they persisted in delinquency.

The district court granted Dean's motion for partial summary judgment without determining whether or not Dean had actually been compelled by ALPA to sponsor political activities or other activities not germane to collective bargaining. In the district court's view, the question whether Dean "was or was not delinquent is not material." A. 8.[3] By "refusing Dean's request for an adjustment, ALPA has breached its duty . . . [and Dean's] discharge . . . was unlawful as a matter of law. . ." A. 9.

Thereafter, the district court entered a permanent injunction (A. 14-17) compelling ALPA and TWA to reinstate Dean. ALPA and TWA appealed pursuant to 28 U.S.C. § 1292(a) and the U.S. Court of Appeals for the Ninth Circuit reversed.

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[3] The district court did state, incorrectly, that "ALPA concedes that at all times material, it spent money for purposes other than collective bargaining." A. 8. In fact, ALPA had stipulated only that it spent union funds for a variety of purposes—including contract negotiations, grievance processing, member recruitment, and defense and prosecution of litigation related to bargaining agreements—but did not concede that any of such purposes were unrelated to collective bargaining. A. 24-25.

Relying upon the explicit language of the Court's opinion in *Street, supra*, and *Allen, supra*, the court of appeals held that "protesting employees are not released from their dues-paying obligation simply because they believe that a portion of their dues is being used for political or ideological expenditures." A. 3. Since the Supreme Court had expressly prohibited the use of injunction restraining dues collection in such cases, it follows that "an individual should not be permitted unilaterally to decide to reduce or stop dues payment." A. 4. His remedy, instead, was to seek judicial relief by way of an order compelling a partial rebate of his dues or service charge, or an order enjoining the use of his dues or service charge for political expenditures. *Id.*

The case was remanded with instructions to vacate the order granting summary judgment and the injunction, and for further proceedings on unadjudicated issues.[4]

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Decision Of The Court Of Appeals Is Clearly Correct, And Is In Conflict With No Other Decisions

Section 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, expressly permits employees and unions "to make agreements, requiring, as a condition of continued employment . . . all employees . . ." to pay their bargaining representative's customary membership dues. It is settled, however, that this enactment does not authorize unions to compel employees to sub-

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[4] Dean also argued in district court that his discharge was invalid because ALPA had failed to comply with the pre-discharge notification process established in the ALPA-TWA agency shop agreement. Neither the district court nor the court of appeals addressed this contention.

sidize union activities not germane to collective bargaining. *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961); *Brotherhood of Railway and Steamship Clerks* v. *Allen*, 373 U.S. 113 (1963); *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). Accordingly, when a union spends exacted funds for political campaign contributions or other political or ideological objectives, dissident employees are entitled to a partial rebate from the union when they raise an appropriate objection.

Even if Dean's correspondence with ALPA were deemed to present a request for a partial rebate under *Street*, however, the court of appeals properly concluded that Dean was not thereby excused from his contractual obligations to the union. Thus, in *Street* itself, this Court made it explicit that even employees who have truly expressed objections to their union's non-germane expenditures remain obligated, nevertheless, to comply with the terms of the union-security contract; their proper remedy is to demand a rebate from the union and to sue in federal court if it is refused. In the interim, they must comply with the applicable bargaining agreement. *Street*, *supra*, at 771.

For the same reasons, this Court vacated, in *Allen*, *supra*, 373 U.S. at 119-120, a state court order enjoining enforcement of the union security contract:

> "We also held in *Street* that an injunction relieving dissenting employees of all obligation to pay the money due under an agreement authorized by Section 2, Eleventh was impermissible . . . The injunction granted [below] . . . was thus improper, even though it is subject to modification if petitioners come forward and prove the proportion of exacted funds required for purposes germane to collective bargaining. Even such a remedy we think, 'sweeps

> too broadly . . . [and] might well interfere with the . . . union's performance of [its statutory] . . . functions' It also follows from *Street* that the Superior Court erred in granting respondents interim relief against compliance with the financial obligations imposed by the Agreement . . ."[5]

The court of appeals correctly applied that doctrine here. Since the courts cannot enjoin the collection of union dues, it held, an employee cannot be permitted unilaterally to reduce or eliminate his dues obligation. The district court's contrary ruling was properly reversed because it "in essence approved Dean's self-help injunction." A. 4. Other federal courts which have considered the question have reached the same result. *Hostetler* v. *Brotherhood of Railroad Trainmen*, 287 F.2d 666, 668 (4th Cir. 1961), *cert. denied*, 368 U.S. 955; *Bagnall* v. *ALPA*, 626 F.2d 336, 340 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981).

Contrary to Petitioner's suggestion (Pet. 4-8), there are no conflicting decisions. The cases cited by Petitioner are plainly inapposite. Thus, *Seay* v. *McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir. 1970) simply holds that a federal district court has jurisdiction over an employee's complaint alleging union expenditures, from exacted funds, for political and ideological purposes, and that this jurisdiction is not impaired by any grant of authority to the National Labor Relations Board contained in 29 U.S.C. § 151, *et seq.* *International Union, etc.*, v. *NLRB*, 675 F.2d 1257 (D.C. Cir. 1982) is likewise distinguishable: there the question presented was whether a

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[5] In *Abood*, *supra*, the Court again emphasized that any *Street* remedies devised would be improper if they restricted the union's "ability to require every employee to contribute to the cost of collective bargaining activities." 431 U.S. at 237.

union could lawfully insist, during bargaining under the National Labor Relations Act, upon inclusion of an agency shop provision despite the fact that applicable state law prohibited such agreements.[6]

Finally, Petitioner's reliance upon *Glover* v. *St. Louis-San Francisco Ry. Co.*, 393 U.S. 324 (1969) is entirely misplaced. *Glover* dealt with the question whether an employee complaint should be dismissed because he failed to exhaust his contractual remedies; in the instant case, no party contended and no court ruled that Dean was obliged to exhaust any remedies before bringing suit.

2. The Court Of Appeals' Decision Does Not Decide An Important Question Of Federal Law Which Should Be Settled By This Court.

Although the Petition asserts that Dean's constitutional rights have been violated, Pet. 8-11, this case presents no constitutional questions at all. Indeed, it was precisely to *avoid* constitutional questions that this Court, in *Street*, interpreted the Railway Labor Act's Section 2, Eleventh, narrowly and concluded that Congress did not authorize unions, over an employee's objection, to spend his money for political purposes he opposes. 367 U.S. 749-50, 767-770. If unions act in disregard of those limits, therefore, a federal court remedy is available which makes resort to constitutional questions unnecessary. Petitioner has not sought to invoke that remedy, and there is nothing in the court of appeals' decision which would limit its availability or its efficacy.

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[6] The NLRA contains an explicit provision disclaiming preemption of such state laws. 29 U.S.C. Section 164(b). See *Retail Clerks Int'l Ass'n.* v. *Schermerhorn*, 373 U.S. 746 (1963). No such disclaimer appears in the Railway Labor Act.

Nor does this case pose the question whether certain specified union expenditures should be characterized as "germane to collective bargaining" or "nongermane and political." In the view it took of the law, the court of appeals correctly found it unnecessary to reach that issue here.

Hence, although Petitioner repeatedly insists that ALPA "improperly" refused to grant him a partial rebate, Pet. 2, 5-8, the fact remains that ALPA's refusal was neither improper, nor "deceitful" (Pet. 6), nor unlawful unless Dean made a proper request for a rebate and ALPA actually spent his exacted funds for purposes not germane to collective bargaining. But ALPA contended below that neither of these conditions had been satisfied, and no disposition of these additional defenses was either required or rendered.[7]

Nor do any of the "special circumstances" identified in the Petition, at p. 7, create an issue warranting review. The fact that Dean is not a member of ALPA is quite immaterial since the agency shop arrangement itself—which by definition applies to nonmembers—is lawful and constitutional. See *NLRB* v. *General Motors Corp.*, 373 U.S. 733 (1963). The claim that Dean was required by the ALPA-TWA agreement only to pay his "proportionate share of costs incurred in collective bargaining" (Pet. 4, 7, 10) is a misstatement; the agreement itself describes the service charge as "an amount equal to the Association's regular and usual monthly dues . . ." A. 41.

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[7] As previously noted, *supra*, p. 3, n.3, the district court erroneously stated that "ALPA concedes that . . . it spent money for purposes other than collective bargaining." Petitioner does not here seek to demonstrate either that the district court's statement was accurate, or that the court of appeals erred in ignoring it.

Finally, the claim that ALPA and TWA failed to provide Dean with the notice required by the agreement (Pet. 10-11) is not properly before this Court. Neither the district court nor the court of appeals addressed the merits of this claim; ALPA has consistenly maintained that the claim is contrary to the record evidence; and Petitioner himself acknowledged in the court of appeals that there were material issues of fact which precluded summary disposition of this question. Brief for Plaintiff-Appellee, at p. 29, in *Dean* v. *Trans World Airlines, Inc. and Air Line Pilots Association, Int'l*, No. 82-3133 (9th Cir. 1983).

3. The Petition Is Untimely.

Since the judgment of the court of appeals was entered on June 16, 1983 (Pet. V), and the instant Petition was not filed until on or about October 6, 1983, the Petition was plainly filed too late, 28 U.S.C. § 2102(c), unless an extension of time was granted or "a petition for rehearing . . . [was] timely filed" in the court of appeals. Rule 20.4, Rules of the Supreme Court.

The record shows that Petitioner did not file a "petition for rehearing" within the meaning of Rule 20.4. The sole post-decision filing made by Petitioner in the court of appeals was a one-page document, reprinted in the Appendix to this Brief, *infra*, styled "Appellee's Motion for En Banc Rehearing."

This document was obviously intended to serve as suggestion for rehearing en banc pursuant to Rule 35, Federal Rules of Appellate Procedure, because the sole basis for relief consisted of an assertion that the court of appeals' decision herein was inconsistent with the court of

appeals' prior decision in *Seay, supra.*[8] Moreover, the court of appeals correctly characterized Petitioner's filing in its order entered August 25, 1983. There, the court of appeals cited Rule 35, Federal Rules of Appellate Procedure, and stated that the "suggestion for rehearing en banc is rejected . . . No petition for rehearing was requested." A.1. Neither Rule 35, F.R.A.P., nor this Court's Rule 20.4, contemplates that a suggestion for rehearing en banc, when not accompanied by a petition for rehearing, will affect the finality of a court of appeals judgment. See Rule 35(c). Accordingly, Petitioner's post-decision filing was ineffectual to toll the time for filing a petition for certiorari. Since no extenstion of time has been sought herein, the Petition should be dismissed as untimely.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied or dismissed.

Respectfully submitted,

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(202) 797-4096

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[8] Rule 35 explains that rehearing in banc "is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions. . ."

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-3133

JOHN DEAN,

Plaintiff-Appellee,

v.

TRANS WORLD AIRLINES, INC., a Delaware Corporation; and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,

Defendant-Appellants.

APPELLEE'S MOTION FOR EN BANC REHEARING

COMES NOW the appellee, JOHN DEAN, by and through his attorney of record, L. S. EDMONDSON, and moves for the court for an en banc rehearing of this case.

An en banc rehearing is necessary because two decisions of this court, *Seay* v. *McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir. 1970) and *Seay* v. *McDonnell Douglas Corp.*, 553 F.2d 1126 (9th Cir. 1976), were not considered and were effectively overruled without discussion by the court's opinion.

Respectfully submitted,

/s/ L. S. EDMONDSON

L.S. Edmondson
Attorney for Appellee
1100 Puget Sound Bank Bldg.
Tacoma, Washington 98402

COPY
12/12/80 mh

15 March 1976

Air Lines Pilots Assoc.
1625 N.W. Ave. N.W.
W.D.C., 20036

Gentlemen:

Enclosed is my monthly dole as required by paragraph 3B of the agreement with TWA and ALPA.

I received your letter from John J. Magee dated 17 February 1976 in response to my letter of 22 January 1976 (misdated 22 December), but your attachment mentioned was not enclosed. I call to your attention that 3B(A) of the TWA-ALPA agreement calls for a service charge "for the administration of this agreement . ." to be payable on the 15th of each month and does not authorize any form of interest charge that I have objected to and refuse to pay. In addition 367 USC 740 (1961) IAM vs. Street and 373 US 113 (1963) BRC vs. Allen concluded that only charges to administer a contract could be forced upon honest citizenery [sic] by oppressive Labor Unions, and all other union activities, such as payments to other unions (such as the AFLOCIO), bribes, political contributions, mafia payoffs, etc., could not be charged. A recent decision in California enforces the point. Therefore, please reduce your billing procedure as soon as possible and charge me only for your legally allowed contractable items and refund to me immediately the overcharges for your illegal activities. Paragraph 3B(A) also clearly states the charge is a monthly charge and not a yearly one, so please revise your statement of account to reflect that fact and remove all extraneous gibberish.

Anti-fraternally yours,

/s/ JOHN L. DEAN

John L. Dean
326 E. 30th Street
Kansas City, Mo. 64108